

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2005-000540-001 DT

02/23/2006

HON. MARGARET H. DOWNIE

CLERK OF THE COURT  
L. Rasmussen  
Deputy

FILED: 02/27/2006

GREG PARKINSON

DALE F NORRIS

v.

GUADALUPE PUBLIC SAFETY RETIREMENT RICHARD S COHEN  
LOCAL BOARD (001)  
DOVAR FLORES (001)  
WAYNE CLEMENT (001)  
ROSEMARY ARELLANO (001)  
FELIPE QUINTERO (001)  
ALLAN ROMANIA (001)

JUSTIN S PIERCE  
40 N CENTRAL AVE  
PHOENIX AZ 85004  
OFFICE OF ADMINISTRATIVE  
HEARINGS  
REMAND DESK-LCA-CCC

**RULING**

Plaintiff Greg Parkinson (hereafter, "plaintiff" or "Parkinson") appeals from a final decision by the Guadalupe Public Safety Retirement Local Board (hereafter, "Board") denying his disability pension application. This court has jurisdiction over plaintiff's appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* The court has considered the record from the administrative proceedings,<sup>1</sup> as well as the memoranda submitted and the arguments of counsel.

A.R.S. § 12-910(E) defines the scope of this court's review:

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<sup>1</sup> The parties stipulated to the contents of the record on appeal. See Certification of Record on Review, filed November 14, 2005.

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The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

In determining the propriety of the Board's final decision, this court views the evidence in the light most favorable to upholding its action and will affirm if the decision is supported by any reasonable interpretation of the record. *See Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The court does not function as a "super agency" and may not substitute its judgment for that of the Board where factual questions are involved. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984). The Board's legal interpretations and conclusions, on the other hand, are not binding on the court. *Begay v. Arizona Dept. of Economic Security*, 128 Ariz. 407, 626 P.2d 137 (App. 1981); *Carondelet Health Services v. Arizona Health Care Cost Containment System Admin.*, 182 Ariz. 502, 897 P.2d 1388 (1995).

Parkinson was the Fire Chief for the Town of Guadalupe (hereafter, "Town") from August 10, 1995 until February 17, 2004. He suffered a work-related neck injury on June 20, 2000. Plaintiff initially returned to limited duty status, but was later medically released to work without restriction.<sup>2</sup> In the year preceding his resignation, Parkinson did not visit any health care provider regarding his neck.<sup>3</sup> After his neck injury, he returned to recreational activities such as skiing, boating, and riding all terrain vehicles.

On February 3, 2004, Town Manager Thomas Morales delivered a letter to plaintiff that stated, in relevant part:

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<sup>2</sup> See Minutes of the Local Public Safety Retirement Board dated May 4, 2004, ¶ 2.

<sup>3</sup> This was the case notwithstanding the following language in plaintiff's January 2003 performance evaluation:

Greg continuing to struggle with his recurring neck problems and the desire is that medical intervention can assist in this area.

Physical durability is critical for this position!

In the "comments by employee" section of the evaluation, no medical issues are mentioned. At the December 13, 2004 meeting of the Board, counsel explained that Parkinson did not seek medical treatments "as that would have opened the industrial claim, but that he took days off from work because of his neck hurting."

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After consulting with Attorney Troy P. Foster, Law Office of Lewis and Roca, I have decided to place you on administrative leave with pay pending an internal investigation. You are ordered to cooperate with the investigation in every respect and refrain from talking to any other fire-fighters. Also, until the investigation is complete, you are not to be on Town property for any reason without my prior approval. All keys associated with the building, your office, and personal files need to be turned-in to me by 9:00 a.m., February 03, 2004.

Three days later, on February 6, 2004, plaintiff submitted an application for accidental disability pension. He listed the date of his disability as June 20, 2000 and explained its cause as follows:

While working at the Fire Dept., I picked up a large roll of fire hose sustaining 3 herniated discs in neck. Was released back to work in 2001 and condition has worsened so that I can't function in job duties and am having problems even in regular functions—lots of pain and inability to do normal tasks.

The record reflects that a Notice of Intent to Terminate was drafted by the Town, but even construing the facts and the inferences in the light most favorable to the defendants, the record does not support a finding that plaintiff received that notice. Unlike virtually every other piece of correspondence in this matter, the draft notice was neither signed nor on Town letterhead. Plaintiff has consistently denied ever receiving the notice<sup>4</sup> or being advised of the specific reasons for placing him on leave. There is also no competent proof that plaintiff was aware of the pre-termination hearing set for February 18, 2004 at 10:00 a.m. For purposes of this appeal, this court must assume that plaintiff was aware of neither the notice of intent to terminate nor the pre-termination hearing. As such, there is no evidence in the record that Parkinson knew of the specific allegations being made against him, though he obviously knew that he had been placed on administrative leave and that an internal investigation was pending. On February 17, 2004, plaintiff tendered his resignation.

The Board first met to consider plaintiff's disability pension application on May 4, 2004. It voted to refer the matter to a "medical board." On July 26, 2004,<sup>5</sup> the Board met again and, after considering the medical board report,<sup>6</sup> voted to award plaintiff an accidental disability

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<sup>4</sup> Plaintiff claims that he first saw the draft notice of intent to terminate after his attorney made a public records request to the Town on August 20, 2004. Nothing in the record contradicts that assertion.

<sup>5</sup> The Board's Order dated June 18, 2005 incorrectly states in paragraph three that the Board's vote occurred on July 26, 2005.

<sup>6</sup> Although the court was not provided with a copy of the report from Dr. Levine, it is clear from the December 13, 2004 meeting minutes that Dr. Levine opined that plaintiff was only capable of working in a "sedentary capacity." The Board's minutes refer to Dr. Levine's reports in various contexts, including the following:

Mr. Norris referred to the IME and specifically to page 9 where Dr. Levine states: "I concur with Dr. Stojic's impairment rating, and do not feel that the patient would benefit from further active

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pension. On August 19, 2004, the Board reconvened in a special meeting. The minutes from that meeting state, in relevant part:

After review of the information on the PSPRS website by one of the board members, Mr. Johnson received a call from the board member bringing the provisions for disability pension to his attention which seemed to be in conflict with the action taken by the local board at the last meeting. The information referenced ARS 38-844 B which indicated that the terminated employee must be terminated for reason of the disability. . . .After looking at the provision and talking with the Town Manager relative to the reason Mr. Parkinson had been terminated it appeared that the requirements of the statute had not been met as Mr. Parkinson had not been terminated for reason of disability. After being told that Mr. Parkinson had not been terminated for reason of disability, Mr. Johnson contacted Mr. James Nielson, Acting Director of the Public Safety Personnel Retirement System, who confirmed that a disability pension can only be granted if the termination of the employees is for reason of disability. Based on this information, it was felt necessary to revisit the action taken by the board at its earlier meeting.

Parkinson and his attorney spoke at this meeting and responded to the Board's questions. The Board voted to reconsider its July 26, 2004 approval of plaintiff's pension application, but deferred making a final decision. By letter dated September 30, 2004, the fund manager for the PSPRS sent a letter to the Board stating, *inter alia*:

As you are aware, A.R.S. § 38-844(B) also requires that a member's employment be terminated by reason of accidental disability as a prerequisite for eligibility for an accidental disability pension. It appears, however, that a question has arisen as to whether this statutory requirement was met.

As a consequence, pursuant to A.R.S. § 38-847, the fund manager through this office requests that your local board conduct a rehearing on this matter to specifically address and determine whether Mr. Parkinson's employment was terminated by reason of accidental disability.

The Board met again on December 13, 2004. The minutes from that meeting reflect that Board members questioned Parkinson and his attorney regarding various issues of concern.<sup>7</sup> The minutes state:

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care." He also referred to a statement in the IME indicating that based on the job description the patient cannot perform the central prerequisites of his job type.

<sup>7</sup> The Board declined to swear in witnesses, according to the meeting minutes. Why the Board would decline to do so is unclear, and its refusal undercuts its present attempts to characterize certain statements as "testimony" and to rely on arguments about the credibility of "witnesses."

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Chairman Flores asked Mr. Parkinson why no reason was given for resignation in his letter of resignation dated February 17, 2004. Mr. Parkinson responded by saying that he had submitted the application for disability prior to his letter of resignation. Chairman Flores asked Mr. Parkinson why he applied for disability on February 6<sup>th</sup>, but did not resign until February 17<sup>th</sup>. Mr. Parkinson responded that he was having problems with his neck and that the local board was not set up. He had asked the town manager how to apply for a disability retirement but was told he did not know. Mr. Parkinson stated he contacted the Public Safety Personnel Retirement System (PSPRS) office and was told he needed to present an application to the local board. He also stated that he would have submitted his application earlier if he had know [sic] the guidelines and stated that the local board was not organized and had never met.<sup>8</sup>

After further questions, explanations, and discussion, the minutes reflect:

Chairman Flores read ARS 38-844B which states: "A member is eligible for an accidental disability pension if the member's employment is terminated by reason of accidental disability" and stated this is the requirement for the board to approve a disability retirement. The question is was termination of employment due to disability? Chairman Flores stated that with all the information presented and what was just read from the Arizona Revised Statute, is there a motion?

A motion was made to reverse the Board's earlier decision approving plaintiff's disability pension application. The motion carried by a vote of 3 to 1. The Board's written order states that, "the resignation of Gregory J. Parkinson was not solely caused by the accidental disability."<sup>9</sup>

This court concludes that the Board's decision was not supported by substantial evidence and was contrary to law, arbitrary, capricious, and an abuse of discretion. Parkinson clearly suffered a job-related injury in 2000 that continued to cause him problems. Moreover, it is uncontroverted that Plaintiff was never terminated. Parkinson resigned, citing his disability as the reason. The question then becomes whether there was substantial evidence from which the Board could have found that plaintiff's resignation was not the result of his disability.

If there were any competent evidence that the Notice of Intent to Terminate had actually been sent, there would at least be room for two opinions<sup>10</sup> as to why Parkinson and the Town

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<sup>8</sup> At a later point in the meeting, Parkinson stated that he downloaded the disability application in January and asked the Town Manager how to process it, but got no direction.

<sup>9</sup> Board Order dated June 18, 2005.

<sup>10</sup> See *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981) ("where there is room for two opinions, the actions is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.").

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parted ways. Affirmance of the Board's final decision would be required under the applicable standard of review. Without that evidence, however, nothing in the record supports the Board's final decision. At most, Parkinson knew when he resigned that he had been placed on administrative leave pending an internal investigation due to unspecified concerns. Yet Parkinson had first obtained the disability pension application in January – well before the Town notified him of any disciplinary-related concerns. Plaintiff also had made inquiries to Town officials about how to process his disability application prior to receiving the February 3, 2004 letter.

The case of *Leschinsky v. Public Safety Personnel Retirement System*, 27 Ariz. App. 618, 557 P.2d 550 (1976) does not support the Board's position. In *Leschinsky*, a police officer applied for a disability pension seven months after he had been terminated due to a burglary conviction. His alleged disability had never been reported to his employer prior to his termination. The facts of the instant case are readily distinguishable. Parkinson was never terminated and, as described above, there is no competent evidence that he knew why the Town was investigating him. There was certainly nothing clear-cut like a burglary conviction of a police officer. Moreover, Parkinson's job-related injury and ensuing problems were clearly known and documented by his employer.

Based on the foregoing, this court finds that the Board's decision was not supported by substantial evidence and was contrary to law, arbitrary, capricious, and an abuse of discretion. The only competent evidence in the record establishes that Parkinson's employment with the Town of Guadalupe terminated by reason of accidental disability.

IT IS ORDERED reversing the decision of the Guadalupe Public Safety Retirement Local Board. Plaintiff's requested relief is granted.

/s/ Margaret H. Downie  
HON. MARGARET H. DOWNIE